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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/964,143	09/25/2001	James Hugh McLaughlin	077698-0012	1702
20277 7590 04/01/2008 MCDERMOTT WILL & EMERY LLP 600 13TH STREET, N.W. WASHINGTON, DC 20005-3096				
EXAMINER				
WANG, SHENGJUN				
ART UNIT		PAPER NUMBER		
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/964,143

Applicant(s)

MCLAUGHLIN, JAMES HUGH

Examiner

Shengjun Wang

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 December 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 37 and 44-59 is/are pending in the application.
- 4a) Of the above claim(s) 37 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 44-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/88)
- Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Receipt of applicants' remarks and the 132 declaration submitted December 31, 2007 is acknowledged.

Claim Rejections 35 U.S.C. 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 44-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zabototie et al. (US 4,673,526), and Barker et al. (US 5,360,824, of record) in view of Kellner (US 6,042,815, of record), McAttee et al. (US 6,153,208, of record), Stewart et al. (US 6,197,281), Geria (US 4,992,476), Daniel et al. (US 5,891,449), and Gagnebien et al. (US 5,888,951).
3. Zobototie et al. teaches an anhydrous cosmetic composition for deep cleansing of skins comprising about 50-95 % of oily phase, about 1-30 % of emulsifying agent (surfactant), and about 1-10% of particulate abrasive agents. The composition is preferred in gel forms. See, particularly, col. 1, lines 7-20, line 66 to col. 2, line 12, and the claims. The oily phase comprising oils, which may be animal oil, vegetable oil, mineral oil, silicone oil or synthetic ester, of fatty acid, fatty alcohol, the oily phase may also comprising wax, which includes cetyl alcohol, stearyl alcohol, and salt of fatty acids, such as calcium, magnesium and zinc salts of stearate, myristates, oleate, lanolate et al. See, particularly, col. 2, line 13 to col. 4, line 15. Barker teaches skin cleansing composition comprising an oil phase with water soluble abrasive

particulates suspended in the oil phase. sodium chloride particulates are disclosed as one of those particulate. See, particularly, the claims.

4. The primary references do not teach expressly the particular percentage of each and every ingredient herein claimed, or the employment of particular ingredients, such as particular abrasive agents, particular oil, calcium stearate, or the employment of sodium chloride, pumice, kernel starch as a particulate ingredients, and sodium cocoyl N-methyl taurate as the surfactant.

However, Kellner teaches water and oil emulsion solid cosmetic compositions. The composition comprising up to 30% of emollient oil, both natural and synthetic oil may be employed (see, particularly, col. 9, line 29 to col. 11, line 62. Kellner further discloses that addition emollient materials, such as fatty alcohol, wax, etc., as oil phase gelling agent may be employed up to 30% (see, particularly, col. 2, lines 66-67; col. 7, line 45 to col. 9, line 26). Kellner further teaches that up to 20 % of primary gelling agent may used, wherein the preferred primary gelling agent are salt of fatty acid, particularly, calcium stearate (see col. 2, lines 24-65). Surfactants up to 20% are desirable in the composition. Surfactants, including cationic, anionic nonionic and zwitterionic surfactants are suitable (see, col. 16, line 9 to col. 19, line 34). The composition may comprising up to 50% of particulate matter, the particulate matter may be organic or inorganic, such as corn starch, mica, etc. (see col. 19, lines 37-61). Stewart et al. teaches that polyvalent soaps, such as calcium stearate are well known to be useful as thickener fro making oil-based gel. See, particularly, col. 9, lines 24-29. Geria et al. teaches that pumice is known to be useful as abrasive particles in cosmetic composition. See, particularly, col. 7, lines 25-40. McAtee disclosed that sodium cocoyl methyl taurate is similarly useful as other anionic

surfactant in cleansing composition. (col. 20, lines 1-13). Daniel et al. teaches that kernel flour is known to be useful as abrasive agent in cleansing composition. Gagnebien et al. teaches that macadamia oil is known to be used in cleansing composition. See, particularly, col. 4, lines 35-40.

Therefore, it would have been prima facie obvious to a person of ordinary skill in the art, at the time the claimed the invention was made, to make a composition with the particular percentages of each and every components herein since the percentage range herein defined are either encompassed by, or overlapped with the range disclosed by the primary reference. Note it is well settled that in the case where the claimed ranges “overlap or lie inside ranges disclosed by the prior art” a prima facie case of obviousness exists. In re Wertheim, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); In re Woodruff, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990). Also see MPEP 2144.05. The employment of the particular ingredients such as kernel flour, sodium chloride, pumice, sodium N-cocoyl N-methyl taurate, macadamia oil and calcium stearate is obvious since all these ingredients are known to be useful in the cleansing composition. The employment of such components in the composition is seen to be a selection from amongst equally suitable material and as such obvious. Ex parte Winters 11 USPQ 2nd 1387 (at 1388). The employment of sodium chloride is obvious because sodium chloride particulate is known to be useful in cleansing composition. The employment of calcium stearate is further obvious in view the fact that it is known to be useful as thickener in oil based composition.

Response to the Arguments

Applicants' remarks and the 132 declaration have been fully considered, but are not persuasive.

5. The declaration under 37 CFR 1.132 filed December 31, 2007 is insufficient to overcome the rejection of claims 44-59 based upon Zabottoe et al. (US 4,673,526), Barker et al. (US 5,360,824, of record), Kellner (US 6,042,815, of record), McAtee et al. (US 6,153,208, of record), Stewart et al. (US 6,197,281), Geria (US 4,992,476), Daniel et al. (US 5,891,449), and Gagnebien et al. (US 5,888,951) as set forth in the last Office action because: It refer(s) only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims. See MPEP § 716.

6. In response to applicant's arguments against the references individually, the examiner again maintains that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Furthermore, the Supreme Court recently reiterated "the need for caution in granting a patent based on the combination of elements found in the prior art" (*KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1739 (2007)), particularly where there is "no change in their respective functions" (*id.*). In other words, "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results" As shown by the cited references as a whole, all the elements are known in the prior art for their function, The claimed invention yield no more than what predicted by the prior art.

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Shengjun Wang whose telephone number is (571) 272-0632. The examiner can normally be reached on Monday to Friday from 7:00 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan, can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Shengjun Wang/
Primary Examiner, Art Unit 1617